

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES GREGORY MARLOW,) No. C 10-00980 JF (PR)
Plaintiff,) ORDER OF DISMISSAL
v.)
R. K. WONG, et al.,)
Defendants.)

Plaintiff, a California prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. In his complaint, Plaintiff states that he did not file an administrative appeal to the highest level of review available to him. Consequently, this case is DISMISSED without prejudice for failure to exhaust administrative remedies.

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. at § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.

1 1988).

2 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321
 3 (1996) (“PLRA”) provides: “No action shall be brought with respect to prison conditions
 4 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,
 5 prison, or other correctional facility until such administrative remedies as are available
 6 are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the
 7 discretion of the district court. Woodford v. Ngo, 548 U.S. 81, 84 (2006). Exhaustion is
 8 a prerequisite to all prisoner lawsuits concerning prison life, whether such actions involve
 9 general conditions or particular episodes, whether they allege excessive force or some
 10 other wrong, and even if they seek relief not available in grievance proceedings, such as
 11 money damages. Porter v. Nussle, 534 U.S. 516, 524 (2002). The exhaustion
 12 requirement requires “proper exhaustion” of all available administrative remedies. Ngo,
 13 548 U.S. at 93.

14 The State of California provides its prisoners and parolees the right to appeal
 15 administratively “any departmental decision, action, condition or policy perceived by
 16 those individuals as adversely affecting their welfare.” Cal. Code Regs. tit. 15, §
 17 3084.1(a). In order to exhaust available administrative remedies within this system, a
 18 prisoner must proceed through several levels of appeal: (1) informal review, (2) first
 19 formal written appeal on a CDC 602 inmate appeal form, (3) second formal level appeal
 20 to the institution head or designee, and (4) third formal level appeal to the Director of the
 21 California Department of Corrections and Rehabilitation. Barry v Ratelle, 985 F. Supp
 22 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final decision
 23 from the Director’s level of review satisfies the exhaustion requirement under § 1997e(a).
 24 See id. at 1237-38.

25 Because exhaustion under § 1997e(a) is an affirmative defense, a complaint may
 26 be dismissed for failure to exhaust only if failure to exhaust is obvious from the face of
 27 the complaint and/or any attached exhibits. Wyatt v. Terhune, 315 F.3d 1108, 1119-20
 28 (9th Cir. 2003). The Court may dismiss a complaint for failure to exhaust where the

1 prisoner “conce[des] to nonexhaustion” and “no exception to exhaustion applies.” *Id.* at
2 1120. Here, Plaintiff concedes in his complaint that he has not appealed to the highest
3 level of appeal available to him. (Compl. at 2.) He states that the reason he did not
4 present his claims through the grievance procedure is that the prison staff “stall[s]
5 grievances, lose them, [and] play games,” and that he is in “imminent danger of serious
6 physical injury.” (*Id.*) However, Plaintiff does not identify a single grievance to indicate
7 that he has made a good faith effort to seek and exhaust administrative remedies.
8 Furthermore, none of his reasons are exceptions to exhaustion to excuse him from the
9 PLRA’s requirement of “proper exhaustion” under *Ngo*: “Proper exhaustion demands
10 compliance with an agency’s deadlines and other critical procedural rules because no
11 adjudicative system can function effectively without imposing some orderly structure on
12 the course of its proceedings.” 548 U.S. at 90-91 (footnote omitted). As it is clear from
13 the complaint that Plaintiff has not “properly exhausted” his claims by pursuing all levels
14 of administrative review available to him, and there is no applicable exception to the
15 exhaustion requirement, dismissal without prejudice is appropriate.

16 Accordingly, the above-titled action is hereby DISMISSED, without prejudice to
17 Plaintiff’s refiling his claim after all available administrative remedies have been
18 exhausted.

19 IT IS SO ORDERED.
20 DATED: 5/12/10



JEREMY FOGEL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JAMES G MARLOW,

Case Number: CV10-00980 JF

Plaintiff,

CERTIFICATE OF SERVICE

v.

R K WONG, et al.,

Defendants.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 5/28/10, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

James Gregory Marlow E-32700
CSP-San Quentin
CA State Prison at San Quentin
San Quentin, CA 94974

Dated: 5/28/10

Richard W. Wieking, Clerk